

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

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E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant)

v.)

NORFOLK SOUTHERN RAILWAY COMPANY)

Defendant)

Docket No. NOR 42125

**RESPONSE OF E.I. DUPONT DE NEMOURS & COMPANY TO
NORFOLK SOUTHERN RAILWAY COMPANY'S SECOND MOTION TO COMPEL**

Norfolk Southern Railway Company's ("NS's") motion is an improper attempt to obtain discovery of third-party information and records. NS is seeking an order from the Surface Transportation Board ("STB" or "Board") to compel E.I. du Pont de Nemours and Company ("DuPont") to produce certain records of Sentinel Transportation LLC ("Sentinel"), which is a third party to this proceeding. However, DuPont does not have the ability to reach these records.

DuPont has already produced a significant amount of DuPont records regarding Sentinel. For instance, it has produced electronic data from Sentinel invoices to DuPont concerning the {{ }}¹ movements of the Issue Commodities that Sentinel performed for DuPont since 2006. In addition, DuPont has produced its agreement with ConocoPhillips to form Sentinel ("LLC Agreement"). DuPont has also produced its motor carrier agreements with Sentinel for the transportation of the Issue Commodities. Accordingly, DuPont has clearly established that it is willing to produce Sentinel-related records in DuPont's possession, custody, or control.² But,

¹ Text in double braces, *i.e.*, "{{ }}," is designated "HIGHLY CONFIDENTIAL" pursuant to the Protective Order entered by the Board in this proceeding.

² With respect to Interrogatory 47, which requests certain Sentinel information, DuPont has responded to subparts (a) and (b). DuPont has also responded to subparts (e) and (f) by providing Sentinel's shipments for DuPont and Sentinel's motor carrier agreements with DuPont. However, DuPont objects to subparts (e) and (f) to the extent they

PUBLIC VERSION

the issue is not one of willingness—it is that DuPont does not possess or control the information NS is seeking.

Accordingly, NS discovery requests to DuPont is not the appropriate mechanism for NS to obtain Sentinel records. Neither NS nor the Board can insist that DuPont produce information that it does not have and cannot obtain.

I. DUPONT IS ONLY REQUIRED TO PROVIDE DOCUMENTS AND INFORMATION UNDER ITS CONTROL.

DuPont agrees with NS that, in response to a valid discovery request, a litigant must produce information under its control, and a litigant is in control of information in the possession of it subsidiary if the litigant has some legal right, authority, or ability to obtain it on demand. The analysis of control has two parts. First, courts and the Board must determine whether there is a legal right to the information sought. Second, if there is no legal right, a court or the Board may find control where there is a practical ability to obtain the information sought.³

II. DUPONT DOES NOT HAVE A LEGAL RIGHT TO THE REQUESTED DOCUMENTS

The key issue before the Board is whether DuPont has a legal right to obtain the requested Sentinel records. The Third Circuit Court of Appeals, which includes Delaware, has clearly stated that information is not within a litigant's control "[u]nless [the litigant has] a legally enforceable right to secure [the] information."⁴ Furthermore, NS has not met its burden

request DuPont to produce information about Sentinel shipments and contracts with entities other than DuPont—this information is not within DuPont's possession, custody, or control. Further, DuPont objects to subparts (c) and (d) of Interrogatory 47 because the information requested is not within DuPont's possession, custody, or control. With respect to Interrogatory 49, which requests information for each truck owned or leased by DuPont or Sentinel, DuPont has only objected to providing information regarding Sentinel trucks because such information is not within DuPont's possession, custody, or control.

³ However, a party may not be held accountable for failing to produce information unless it had a legal right to the information. *Gerling Int'l Ins. Co. v. Comm'r*, 839 F.2d 131, 138 (3d. Cir. 1988) (holding that a party could not be held accountable for failing to supply a third party's information unless the party had a legally enforceable right to secure the information from the third party).

⁴ *Id.*

PUBLIC VERSION

of establishing that DuPont has control over the documents and information it seeks.⁵ NS alleges that DuPont has a legal right to the requested information based on the LLC Agreement and Delaware law. However, neither the LLC Agreement nor Delaware law provide such a right.

A. The LLC Agreement does not provide DuPont with the right to obtain the requested records.

DuPont's rights under the LLC Agreement {{

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Thus, any DuPont right to obtain Sentinel information must be afforded by Delaware law.

B. DuPont does not have a right to the requested records under Delaware law.

NS's argument that the LLC Act gives DuPont the right to the requested records lacks merit. Specifically, NS relies on Title 6, section 18-305 of the Delaware Code to support its claim that DuPont has a legal right to obtain "true and full" Sentinel information. However, § 18-305 is a limited provision that provides members access to specific categories of corporate books and records (such a financial documents) and only for specific purposes, specifically those "related to the member's interest."⁸

Indeed, it is well established under Delaware law that a person seeking records under § 18-305 "must first establish by a preponderance of the evidence the existence of a 'proper

⁵ *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989).

⁶ {{ }}

⁷ {{ }}

⁸ Del. Code Ann. tit. 6, § 18-305(a).

PUBLIC VERSION

purpose' for inspection."⁹ According to the Delaware Supreme Court, this proper purpose requirement is "[t]he paramount factor in determining whether a stockholder is entitled to inspection of corporate books and records"¹⁰ A "proper" purpose under the LLC Act is one that is "reasonably related to such person's interest" as a member¹¹ and not adverse to the interests of the LLC.¹² "A purely individual purpose in no way germane to the relationship of [a member] to the [LLC] is not a proper purpose within the meaning of the statute."¹³ Thus, this right to records is limited to the corporate governance context,¹⁴ such as where a member is investigating mismanagement¹⁵ or seeking to value the member's interest in the LLC.¹⁶ The right does not permit access to records for individual reasons, such as to facilitate a shareholder's personal decision to use a particular accounting method,¹⁷ or for reasons that may harm the organization, such as to publicly disclose the bases of senior executive compensation.¹⁸

Delaware courts have been clear that that § 18-305 is not a discovery device. Comparing Delaware Court of Chancery Rule 34, which is Delaware's equivalent of Federal Rule of Civil Procedure 34, to title 8, section 220 of the Delaware Code, which is read *in pari materia* with § 18-305,¹⁹ the Delaware Supreme Court concluded that "[t]he two procedures are not the same

⁹ See *Somerville S Trust v. USV Partners, LLC*, C.A. No. 19446-NC, 2002 Del. Ch. LEXIS 103, at *12 (Del. Ch. May 17, 2002) (citing *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997)).

¹⁰ *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982). Delaware case law treats statutory provisions regarding access to books and records of corporations (Del. Code Ann. tit. 8, § 220), limited partnerships, and limited liability companies as analogous. See *Somerville*, 2002 Del. Ch. LEXIS 103, at *12 n.4.

¹¹ *Id.*; see also Del. Code Ann. tit. 6, § 18-305(a) ("Each member of a limited liability company has the right . . . to obtain from the limited liability company from time to time upon *reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company . . .*") (emphasis added).

¹² *CM & M*, 453 A.2d at 792 (Del. 1982).

¹³ *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1034 (Del. 1996).

¹⁴ See *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 571 (Del. 1997).

¹⁵ *Somerville*, 2002 Del. Ch. LEXIS 103, at *25.

¹⁶ *Id.*

¹⁷ *Thomas & Betts*, 681 A.2d at 1033.

¹⁸ *Disney v. Walt Disney Co.*, 857 A.2d 444, 449-50 (Del. Ch. 2004).

¹⁹ See *Somerville*, 2002 Del. Ch. LEXIS 103, at *12 n.4.

PUBLIC VERSION

and should not be confused.”²⁰ The scope of information and records available under section 220 and § 18-305 is much narrower than that available under Chancery Rule 34 and Federal Rule 34.²¹ Accordingly, discovery is not a proper purpose for obtaining records under § 18-305.

Assuming, arguendo, that DuPont would ordinarily have access to the requested records for a proper purpose, DuPont would still not be able to obtain records from Sentinel for the purpose of producing them in discovery in this proceeding. The Delaware Chancery Court has denied access to records where there would ordinarily be a proper purpose for obtaining the records, but an ulterior purpose was present. In *Highland Select Equity Fund L.P. v. Motient Corp.*, a shareholder sought access to corporate books and records for two proper purposes—to investigate possible mismanagement and to communicate with stockholders in connection with an announced proxy contest for control of the corporation’s board of directors.²² However, the court denied access, finding that the shareholder stated proper purposes as a pretext for its actual, improper purpose.²³

Not only must a request under § 18-305 be reasonably related to a proper purpose, but it also must be appropriately limited. It is well established that, where books and records are sought by statute, “entitlement is not open-ended; it is restricted to inspection of the books and records needed to perform the task. Accordingly, inspection is limited to those documents that are necessary, essential and sufficient for the shareholders’ purpose.”²⁴

Tellingly, NS offers no authority for the proposition that requesting business records in order to satisfy discovery requests from a third party is a proper purpose. Moreover, NS does not

²⁰ *Sec. First Corp v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997).

²¹ *Id.* (“A Section 220 proceeding should result in an order circumscribed with rifled precision.”).

²² *Highland Select Equity Fund L.P. v. Motient Corp.*, C.A. No. 2092-VCL, 2007 Del. Ch. LEXIS 37 at *1-2 (Del. Ch. Feb. 26, 2007), *aff’d*, 922 A.2d 415 (Del. 2007).

²³ *Highland*, 2007 Del. Ch. LEXIS 37, at *8.

²⁴ *BBC Acquisition Corp v. Durr-Fillauer Med., Inc.*, 623 A.2d 85, 88-89 (Del. Ch. 1992) (citing *In re B&F Towing & Salvage Co.*, 551 A.2d 45, 51 (Del. Super. Ct. 1988)).

PUBLIC VERSION

explain how a § 18-305 request for the information sought by NS would be reasonably related to DuPont's interest in Sentinel as a member of Sentinel rather than as a litigant in this proceeding. Further, while NS asserts that DuPont can obtain "'true and full' Sentinel information,"²⁵ under Delaware law, NS assertion is speculation that is not based in law and does not square with the Delaware courts' directive that a member is only entitled to information and records that are necessary, essential, and sufficient for its purpose.²⁶

Moreover, NS ignores the potential harm to Sentinel of disclosing the requested records. This is not a situation where the parent and subsidiary are working on the same side of a transaction. DuPont and Sentinel sit on the opposite sides of the negotiating table to enter into a contract for trucking services. Given that DuPont and Sentinel negotiate at arms length regarding the motor carriage services that Sentinel provides to DuPont, DuPont could use the records to undermine Sentinel's negotiating position. NS's claims regarding DuPont's ability under Delaware law to obtain Sentinel information and records and turn them over to NS are unfounded.

III. DUPONT DOES NOT HAVE THE PRACTICAL ABILITY TO OBTAIN THE DOCUMENTS.

Notwithstanding that DuPont clearly does not have a legal right to the documents or information that NS seeks, DuPont will address NS's claim that DuPont has the practical ability to obtain the documents. NS's claim that DuPont has the practical ability to obtain the requested documents is based on two assertions: (1) DuPont and Sentinel are not independent; and (2) DuPont's 80% ownership share indicates control. Both assertions are incorrect.

²⁵ NS's Mot. 11.

²⁶ E.g., *BBC Acquisition*, 623 A.2d at 88-89.

PUBLIC VERSION

A. DuPont and Sentinel are independent.

DuPont and Sentinel are not sufficiently interconnected to warrant a finding of control over the requested information. Courts have found control where “the properties and affairs of the [subsidiary and parent corporations] [were] . . . inextricably confused as to a particular transaction.”²⁷ Accordingly, courts closely examine the actual relationship between the corporate parent and its subsidiary through a fact-specific analysis that includes a variety of factors.²⁸

The cases to which NS cites for the proposition that courts ignore the independence of corporate affiliates do not support NS’s position. In *Brunswick Corp. v. Suzuki Motor Co.*, the court found that a parent corporation was in control of its subsidiaries’ information because, despite claims of independence, the information requested was available to the corporate parent.²⁹ Further, in *Perini America, Inc v. Paper Converting Machine Co.* and *Afros S.p.A. v. Krauss-Maffei Crop*, the courts found that the involved corporate affiliates were not independently operated. In *Perini*, which dealt with records possessed by an affiliate, the court found that the litigant had access to its affiliate’s records because they were alter egos of their owner and, therefore, treating them as “unrelated entities would defy reality.”³⁰ The court in *Afros* conducted a detailed, multi-factored analysis of the independence of the litigant, finding that the litigant was closely connected with its parent, which had the requested information.³¹

²⁷ *Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 140 (3d. Cir. 1988) (quoting *Acme Precision Prods., Inc. v. Am. Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970).

²⁸ See, e.g., *United States v. Int’l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1453-54 (9th Cir. 1989) (“[W]e inquire whether actual control existed.”), *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 131-32 (D. Del. 1986) (finding control after performing a detailed analysis of the relationship between the affiliated corporations).

²⁹ *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684, 686 (E.D. Wi. 1983) (stating that “[a]lthough the defendants strenuously contend that their U.S. subsidiaries are separate, independent entities, . . . the Court is prepared to find as a fact that the information at issue here regarding sales, retail dealers, and employees is available to [the defendants].”)

³⁰ *Perini Am., Inc v. Paper Converting Mach. Co.*, 559 F. Supp. 552, 553 (E.D. Wi. 1983).

³¹ *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 131-32 (D. Del. 1986).

PUBLIC VERSION

Thus, the rule of *Brunswick* is that a parent has control over information of a subsidiary where the parent has access to such information. *Perini* and *Afros* stand for the proposition that a parent is in control over information possessed by its alter ego or closely connected subsidiaries.

NS has not established that DuPont has the level of control found in *Brunswick*, *Perini*, and *Afros*. First, NS has not pointed to any evidence that directly indicates that DuPont has access to the requested information. As stated above, DuPont and Sentinel sit on opposite sides of the table to enter into contracts for service. Thus, it is reasonable to expect that Sentinel would not want DuPont to see what services and terms Sentinel provides to ConocoPhillips or what Sentinel's costs are for providing service to DuPont because to do so could put Sentinel at a disadvantage in negotiations for contract services. The fact that there is a DuPont related employee retirement plan that certain Sentinel employees have benefits under is irrelevant to the documents and information requested by NS.

Second, Sentinel is not an alter ego of DuPont. A subsidiary is an alter ego if "the degree of ownership exercised by the parent [is] greater than that normally associated with common ownership and directorship."³² The Fifth Circuit has stated that "100% stock ownership and commonality of officers and directors are not alone sufficient to establish an alter ego relationship between two corporations."³³ However, NS offers little other evidence to support its proposition that Sentinel is an alter ego of DuPont. {{

}} does not support a finding as a matter of Delaware law that the companies lack independence since the observance of financing formalities "suggest[s]

³² *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 219 (5th Cir. 2000) (citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983).

³³ *Alpine View*, 205 F.3d at 219.

PUBLIC VERSION

separation of corporate entities.”³⁴ Further, the Sentinel retirement plan entered into the DuPont and Related Companies Defined Contribution Plan Master Trust (“Master Trust”) because the Master Trust “allow[s] participants from affiliated plans to invest in several custom designed investment choices through separately managed accounts.”³⁵ DuPont does not contribute to the plan³⁶ and the plan is administered by Sentinel’s Employee Benefit Plans Board, not DuPont.³⁷ NS simply has not offered sufficient evidence to establish that the DuPont-Sentinel relationship is anything other than ordinary.

Board precedent does not support NS’s claim that the DuPont-Sentinel connection is sufficiently close to warrant a finding of control. In two of the Board cases cited by NS, the party being compelled clearly had access to the requested records. In *PYCO Industries—Feeder Line Application—Lines of South Plains Switching, Ltd.*, the Board compelled a subsidiary to produce its parent’s records, which the subsidiary relied upon in the proceeding.³⁸ In *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, the Board compelled a subsidiary to produce the records of its parent and its affiliates where those records concerned how functions would be delegated between the entities.³⁹

NS also cites to *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, which involves an affiliate relationship that is distinct from the DuPont-Sentinel relationship. In *Seminole*, Seminole Electric Cooperative, Inc. (“SECI”), moved the Board to compel CSX Transportation, Inc. (“CSXT”) to produce records of its affiliate, CSX Intermodal, Inc.

³⁴ *Id.* (“The existence of intercorporate loans does not establish the requisite dominance . . . and in fact, interest-bearing loans suggest separation of corporate entities.”)

³⁵ E.I. du Pont de Nemours and Company, Annual Report (Form 11-K), at 4 (June 27, 2011). This report is located at Exhibit E to NS’s motion.

³⁶ *Id.* (Sentinel employees authorize “[Sentinel] to make a payroll contribution” and Sentinel makes a matching contribution.”)

³⁷ *Id.*

³⁸ *PYCO Indus —Feeder Line Application—Lines of S Plains Switching, Ltd.*, STB Finance Docket No. 34922, slip op. at 2 (served Oct. 5, 2006).

³⁹ *Minn. Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, 4 S.T.B. 64, 72-73 (1999).

PUBLIC VERSION

(“CSXI”). The Board found that, because CSXT and CSXI shared “the same parent company, [the defendant] likely [had] access to the information requested.”⁴⁰

Contrary to NS’s implication, the Board’s finding in *Seminole* was not based merely on the affiliation of CSXT and CSXI. Instead, SECI asserted that CSXT had control over CSXI’s documents and information because of CSXT and CSXI’s “commonality of ownership, regular exchange of information in the ordinary course of business, and collaborative efforts in the marketing and delivery of intermodal services.”⁴¹ Further, SECI noted that the Board previously ordered CSXT to produce CSXI’s information and data.⁴² CSXT did not refute these arguments.⁴³ Thus, *Seminole* is not a departure from the clear body of precedent requiring a close examination of the relationship between affiliates.⁴⁴ Moreover, *Seminole* does not stand for the proposition that a corporate parent likely has access to its subsidiary’s records merely because they are related entities.

Additionally, *Seminole* follows the alter ego theory of *Perini*, holding that two affiliates that are wholly-owned by the same parent undoubtedly have access to each other’s information. However, that theory does not apply here because DuPont and Sentinel are not linked through a wholly-owned relationship, like CSXT and CSXI, and therefore, the relationship between DuPont and Sentinel is more formal and distant, despite being a parent-subsidary relationship rather than an affiliate relationship.

B. DuPont’s ownership interest is not evidence of control.

NS’s reliance on DuPont’s 80% ownership share as evidence of control over Sentinel is misguided and nothing more than an attempt to argue control as a matter of law based upon the

⁴⁰ *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (served Feb. 17, 2009).

⁴¹ Ex. A at 7.

⁴² *Id.*

⁴³ CSXT only argued that the information requested was irrelevant and required it to conduct a special study. Ex. B.

⁴⁴ The fact that NS has produced documents which it was able to obtain from its affiliates is irrelevant to the legal issues addressed herein.

PUBLIC VERSION

inherent relationship between DuPont and Sentinel. However, the Ninth Circuit Court of Appeals has established that “[c]ontrol must be firmly placed in reality, . . . not an esoteric concept such as ‘inherent relationship.’”⁴⁵

NS incorrectly conflates ownership with control. While DuPont holds the majority of the ownership interest in Sentinel, it clearly does not possess a “controlling majority interest.”⁴⁶

Rather, {{

}} Accordingly, Sentinel’s organization structure does not allow DuPont to have a controlling interest, regardless of DuPont’s ownership share.

In its discussion of DuPont’s majority ownership interest in Sentinel, NS cites to two cases in which courts found that a parent had sufficient ownership over a partially-owned subsidiary to warrant the production of the subsidiary’s records. However, these cases do not stand for the proposition that ownership interest alone warrants production. *Kamatani v. BenQ Corp.*, a case that NS cites from the Fifth Circuit, involves a finding of control where the parent had a 49% ownership interest in its subsidiary. However, following the well-settled rule in the Fifth Circuit that even 100% stock ownership, without more, is insufficient,⁴⁹ the finding of

⁴⁵ *United States v. Int’l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1453-54 (9th Cir. 1989).

⁴⁶ In addition, the allocation of profits and losses of Sentinel to its Members {{
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⁴⁹ *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 219 (5th Cir. 2000)

PUBLIC VERSION

control was based on multiple factors, including that the parent had the right to appoint members to the subsidiary's board of directors, and had employees that regularly access documents of the subsidiary in the course of the parent's business.⁵⁰ *Brunswick Corp. v. Suzuki Motor Co.*, mentioned above, also involved a multi-factored analysis of control.⁵¹ In *Brunswick*, the court compelled a parent to produce information from its partially-owned subsidiaries after finding that the subsidiaries' information was available to the parent.⁵² Thus, NS has not provided any authority to support a finding that DuPont's ownership share is sufficient evidence of control over Sentinel's records.

IV. CONCLUSION

DuPont is not using Sentinel's status as a separate legal entity as a shield from NS's discovery requests. Instead, DuPont has undertaken a reasonable search for documents and information in DuPont's possession, custody and control, that would be responsive to NS Interrogatories 47 and 49 in order to provide to NS the documents and information that DuPont located. Concerning responsive documents and information that are within the possession, custody, and control of Sentinel, DuPont does not have the legal right or practicable ability to obtain such documents and information from Sentinel to produce them to NS in this proceeding.

DuPont respectfully requests that the Board deny NS's motion because:

- DuPont does not have a legal right to the requested records under the L.I.C Agreement.
- DuPont cannot obtain the requested records under title 6, section 18-305 of the Delaware Code.

⁵⁰ *Kamatani v. BenQ Corp.*, No. Civ. A. 2 03-CV-437, 2005 WL 2455825 at *6 (E.D. Tex. Oct. 6, 2005).

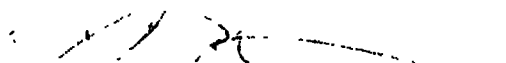
⁵¹ *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684, 686 (E.D. Wi. 1983).

⁵² *Id.*

PUBLIC VERSION

- DuPont and Sentinel are sufficiently independent such that DuPont does not have practical access to Sentinel's information and records.
- DuPont does not have a controlling interest in Sentinel.

Respectfully submitted,



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November 10, 2011

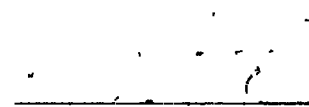
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CERTIFICATE OF SERVICE

I hereby certify that this 10th day of November 2011, I served a copy of the foregoing via e-mail and first class mail upon:

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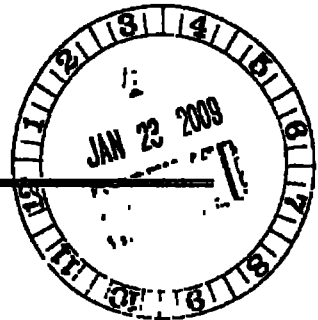
Jason D. Tutrone

Exhibit A

SECI Motion to Compel

024386

BEFORE THE
SURFACE TRANSPORTATION BOARD



SEMINOLE ELECTRIC COOPERATIVE,
INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. 42110

COMPLAINANT'S FIRST MOTION TO COMPEL DISCOVERY

Pursuant to 49 C F R Part 1114.31, Complainant Seminole Electric Cooperative, Inc ("SECI") moves the Board for an order compelling Defendant CSX Transportation Inc ("CSXT") to promptly produce, in full, documents and information responsive to SECI's Fourth Requests for Production of Documents ("Fourth Requests"). A copy of the Fourth Requests, which were served on December 15, 2008, is attached hereto as Exhibit No 1. A copy of CSXT's Responses and Objections to the Fourth Requests ("Responses"), which were served on January 14, 2009, is attached hereto as Exhibit No 2. In support hereof, SECI shows as follows:

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BACKGROUND

This proceeding concerns a challenge by SECI to the reasonableness of certain common carrier rates established by CSXT for the transportation of coal in unit trains from mine origins and origin groups in Kentucky, Illinois, Indiana, West Virginia and Pennsylvania to SECI's Seminole Generating Station near Palatka, Florida. The Complaint requests that the Board examine the reasonableness of the rates at issue using its Constrained Market Pricing methodology as set forth in *Coal Rate Guidelines - Nationwide*, 11 C.C. 2d 520 (1985), *aff'd sub nom., Consolidated Rail Corp. v. United States*, 812 F. 2d 1444 (3rd Cir. 1987) ("*Coal Rate Guidelines*"), and as subsequently interpreted and applied in previous coal rate proceedings.

A central feature of the *Coal Rate Guidelines* is the stand-alone cost ("SAC") test, pursuant to which, *inter alia*, a party in SECI's position is entitled to design a hypothetical, optimally efficient substitute transportation system adequate to handle the issue traffic, and other traffic currently handled by CSXT which reasonably may be "grouped" with the issue traffic. *Id.*, 1 ICC 2d at 544. In assembling such a traffic group, complainants in coal rate proceedings typically identify a subset of the defendant's traffic base, and assemble data relevant to the costs of the assets, facilities and personnel needed to handle that traffic, as well as the revenues that the hypothetical transporter could earn in exchange. *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub No. 1) (STB served September 5, 2007), *see also Public Service Co. of CO d/b/a/ Xcel Energy v. The Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42057 (STB served January 19, 2005) at 3.

In this case, SECI is designing a stand-alone railroad ("SARR") that would replicate some of the infrastructure and related assets and services used by CSXT to serve customers whose traffic shares the CSXT lines used to serve SECI. Among the classes of CSXT traffic to be considered for inclusion in the SARR system is intermodal traffic. However, on information and belief, and based on publicly available documents, CSXT is not solely responsible for all functions related to the intermodal traffic that moves over its lines. A corporate affiliate, CSX Intermodal, Inc. ("CSXI"), apparently markets most (if not all) of the intermodal services that include rail transportation over CSXT's lines, and collects the full revenue for those services, with CSXT being assigned a portion of the revenue intended only to cover its actual operating costs. See CSXT 2007 Annual Report R-1 ("CSXT R-1") at 14B.

In order to discover information regarding the full range of assets and services necessary for the handling of intermodal traffic over CSXT lines, and the full measure of revenue available from that traffic, SECI propounded its Fourth Requests, all of which are directed toward CSXI's operating activities and financial data. As detailed in Exhibit No. 1, RFP No. 105 asks for documents related to trailers and containers handled by CSXI during the relevant time period, including revenues earned on the service. RFP No. 106 seeks documents sufficient to show the linkage between CSXI trailers and containers and CSXT rail cars, as captured in the CSXT train movement records that already have been and/or are being produced. RFP No. 107 requests documents explaining how CSXT bills CSXI for rail-related transportation services and how payments to CSXT are recorded. RFP No. 108 seeks documents showing assets

owned by CSXT and CSXI in connection with intermodal yards or terminals serviced by CSXI RFP No 109 requests a copy of the operating agreement between CSXT and CSXI RFP No 110 asks for documents identifying trailers or containers purchased or leased by CSXI, and RFP No 111 covers documents describing other physical assets that are or have been owned or leased by CSXI and used in connection with its services RFP No 112 asks for documents related to personnel employed by CSXI RFP No 113 requests documents describing services purchased by CSXI from third parties

In its Responses, CSXT offered only to produce documents related to payments made by CSXI to CSXT (Exhibit No 2 at 9), intermodal assets owned or leased by CSXT (as opposed to CSXI) (*id* at 10), and the operating agreement sought in RFP No 109 (*id*) Otherwise, CSXT objected to the production of any documents or data related to CSXI, alleging the following

- 1 CSXI is a separate company and not a party to this proceeding (RFP Nos 105-108, 110-113),
- 2 a substantive response would require performance of a "special study" (RFP Nos 105, 106, 110-113),
3. requested data is irrelevant (RFP No 107), and
- 4 SECI's requests are "overbroad" (RFP Nos 107, 111-113)

As explained, *infra*. CSXT's objections are without merit, and should be overruled The Board should order the prompt production of all documents and data sought in SECI's Fourth Requests

ARGUMENT

The Board's discovery rules accord SECI the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding " 49 C F R Part 1114.21(a)(1). Complainants have broad discovery rights under the Board's rules¹, which follow the policies reflected in the Federal Rules of Civil Procedure². In particular, in cases brought by shippers under the Constrained Market Pricing methodology, the Board and its predecessor repeatedly have held that defendant railroads are subject to broad discovery. *See, e.g., Coal Rate Guidelines*, at 548 ("We recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them.") The documents requested by SECI in its Fourth Requests are entirely appropriate in the context of this rate reasonableness case.

¹ *Simplified Standards for Rail Rate Cases*, at 69. *See also Ocean Logistics Mgmt., Inc. v. NPR, Inc., and Holt Cargo Sys.*, STB Docket No. WCC-102 (STB served Jan. 14, 2000) at 2 ("discovery is very broad" and parties are "expect[ed] to comply with discovery in a prompt and forthright manner"); *General Exemption Authority – Misc Agricultural Commodities – Petition of G & T Terminal Packaging Co., Inc.*, ICC Ex Parte No. 346 (Sub-No. 14A) (ICC decided June 6, 1989) 1989 WL 238737 at * 3.

² *See, e.g., Simplified Standards for Rail Rate Cases*, at 68-69 ("[o]ur discovery rules follow generally those in the Federal Rules of Civil Procedure")

A. CSXT's Status As a Party or a Carrier Is Irrelevant

CSXT's broadest objection, leveled against each of SECI's Fourth Requests save one, claims that documents or data related to CSXI should not be discoverable because "CSXT and CSXI are separate corporate entities CSXI is neither a party to this litigation, nor a carrier regulated by the Board " Responses at 8, 9, 10, 11, 12, 13 However, CSXI's status as a party or a carrier is completely irrelevant to the question of discoverability Proceedings under the *Coal Rate Guidelines* routinely involve the production of documents and information related to non-parties and non-carriers, including third party service providers³, interline transportation partners⁴, coal suppliers⁵, and consultants⁶ Indeed, SECI already has produced documents related to non-parties unaffiliated with SECI in response to CSXT's own discovery requests⁷ The correct inquiry is whether CSXT has control over the requested information, as the term

³ *Western Fuels Association, Inc and Basin Electric Power Coop v BNSF Ry Co*, STB Docket 42088 (STB served September 10, 2007) (disclosure of third party fuel reloading costs), and *Texas Municipal Power Agency v Burlington Northern and Santa Fe Ry Co* STB Docket No 42056 (STB served March 13, 2001) (granting a motion to compel a joint facility agreement).

⁴ *Texas Municipal Power Agency* (STB served March 24, 2003) (third party interline data)

⁵ *AEP Texas North Co v BNSF Ry Co*, STB Docket No 41191 (Sub-No 1) (STB served September 10, 2007) (third party mine loading costs)

⁶ *Wisconsin Power & Light Co v Union Pacific R R Co*, STB Docket No 42051 (STB served June 21, 2000), and *FMC Wyoming Corp and FMC Corp v Union Pacific R R Co* . STB Docket No 42022 (STB served February 5, 1998)

⁷ See *Defendant's First Requests for Production of Documents*, November 7, 2008 at 17-18

generally is understood for purposes of discovery in litigation, and whether the documents and data are relevant to matters at issue in this proceeding. Both questions should be answered in the affirmative.

Public information confirms that CSXT and CSXI are close affiliates that share information regularly and work to coordinate marketing efforts with respect to intermodal traffic. *See, e.g.,* CSXT R-1 at 14B. The Board previously has recognized the close relationship among CSXT, CSXI and their common parent,⁸ and on at least one occasion has directed CSXT to produce information related to CSXI's costs and operating statistics for regulatory purposes. *See Railroad Cost Recovery Procedures -- Productivity Adjustment*, STB Ex Parte No. 290 (Sub-No. 4) (STB served January 31, 2003) at 2. The commonality of ownership, regular exchange of information in the ordinary course of business, and collaborative efforts in the marketing and delivery of intermodal services clearly support the conclusion that CSXT has control over its affiliate's documents and information sufficient to respond substantively to SECI's discovery requests. *Uniden America Corporation v. Ericsson Inc.*, 181 F.R.D. 302, 305-307 (M.D.N.C. 1998).

The relevance of information concerning CSXI's services, assets, facilities and revenues also is clear. Board precedent confirms that relevance is established when the "information might be able to affect the outcome of the proceeding." *Canadian Pac. Ry. Co. -- Control -- Dakota, Minn. & E.R.R. Corp.*, STB Finance Docket No. 35801.

⁸ *See CSX Corporation and CSX Intermodal, Inc. -- Control--Customized Transportation, Inc.*, STB Docket No. 32182 (STB served December 18, 1992) at *1.

(STB Decision No. 8 served Mar. 27, 2008) at 1. The composition of a SARR's traffic group and the attendant costs and available revenues is central to the SAC determination and, by extension, to the outcome of this proceeding. Available public information indicates that intermodal traffic moving over CSXT's lines actually is marketed by CSXI, which also collects the full revenue and rebates to CSXT only "an amount that approximates actual costs" incurred by CSXT for the rail portion of the service. CSXI R-1 at 14B. Without access to the CSXI data sought in its Fourth Requests, SECI will not be able to assess the full measure of revenue associated with the inclusion of CSXT's intermodal traffic in its SARR configuration, or the non-rail costs associated with the service that generates that revenue. As it appears that all revenues above those needed to cover CSXI's "actual costs" are credited to CSXI, lack of access to this affiliate's documents and data would unfairly prejudice SECI in its legitimate effort to assemble the optimal and most cost-efficient SARR traffic group.

Analogous court decisions affirm that CSXT should not be permitted to simply invoke the "separate" corporate status of CSXI as a bar to discovery of data and documents concerning business arrangements between these obviously related parties. "Among transactions calling for close inspection are related-party transactions. [s]uch dealings are viewed with extreme skepticism in all areas of finance." *McCurdy v. Securities and Exchange Commission*, 396 F.3d 1258, 1261 (D.C. Cir. 2005). "The reason for this is apparent. Although in an ordinary arms-length transaction, one may assume that parties will act in their own economic self-interest, this assumption breaks down when the parties are related." *Id.* See also *Gordon v. Commissioner of Internal*

Revenue, 85, T C 309, 325-326 (1985) (citing *Vaughn v Commissioner*, 81 T C 893, 908 (1983) (“Where both parties to the transactions in question are related, the level of skepticism as to the form of the transaction is heightened, because of the greater potential for complicity between related parties in arranging their affairs ”))

The CSXI-related documents and data covered by the Fourth Requests are relevant to a proper determination of the costs, traffic and revenues for a prospective SARR system in this case, and the relationship between CSXT and CSXI is such that the former should be deemed to possess or control such documents and data for discovery purposes. CSXT’s blanket objection to the production of any information related to CSXI should be overruled.

B. The Fourth Requests Do Not Require “Special Studies”

CSXT objects to RFP Nos. 105, 106 and 110-113 “to the extent that [they require] CSXT to perform a special study by compiling and organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business.” Responses at 8. SFCI’s Fourth Requests seek only data and documents as retained by CSXT in the regular course of business, so this objection likewise should be overruled. In the interests of fairness and efficiency through the conclusion of the discovery process, however, the Board also should clarify what would constitute a “special study.”

Historically, the “special studies” objection was upheld when compliance with a discovery request would require a party to gather data that it otherwise did not retain in the ordinary course of its business, or conduct an analysis of retained data that

just as easily could have been performed by the requesting party. See *Entergy Arkansas, Inc. and Entergy Services Inc. v. Union Pacific R.R. Co., Inc.*, STB Docket No. 32817 (STB served May 19, 2008) at 6; *Northern States Power Co. d/b/a Xcel Energy v. Union Pacific R.R. Co.*, STB Docket No. 42059 (STB served May 24, 2002) at 6. This reasonable description should be distinguished from a discovery request that simply asks for defined categories of information from a larger database, or an explanation or illustration of the manner in which a railroad's different databases may be searched or linked. With the preponderance of railroad data relevant to various elements of the SAC determination now stored in computer files, the "special study" exception would swallow the general discovery rule if a defendant railroad could invoke it whenever a complainant asked for a data search or report that does not exist "on the shelf", but readily could be provided if requested by railroad management. SECI's RFP Nos. 105, 106 and 110-113 do not require CSXT to conduct "special studies" as the term traditionally has been understood. Rather, to varying degrees, they ask only that CSXT query certain databases that are maintained by CSXT in the ordinary course of business, and report and/or explain the utility of specific data classes or categories. The Board should direct CSXT to respond substantively to these Requests.

C. Information Regarding CSXI's Margin or Profit Is Relevant

CSXT has objected to subpart (f) of RFP No. 107, on the ground that information regarding CSXI's margin or profit on intermodal traffic that is handled by CSXT is irrelevant. The objection should be overruled. As noted *supra*, relevance is established if the information in question might affect the outcome of a

proceeding *Canadian Pac Ry Co ; Waterloo Railway Company - Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company In Aroostook County, Maine*, STB Docket No AB-124 (Sub-No 2) (STB served Nov 14, 2003) ⁹ Available information and documents indicate that revenues from intermodal traffic handled by CSXT are allocated within the CSX corporate family between CSXT and CSXI, with CSXT credited only for that portion which is calculated to cover its actual operating costs. All remaining revenue, which would include the full margin or profit on the overall intermodal move (including the rail portion), is left with CSXI. Data respecting CSX Corporation's internal assessment of the profitability of CSXT/CSXI intermodal traffic is relevant to the question of the degree to which the revenues that would be available to a SARR if it replicated the CSXT/CSXI service would exceed the total costs attributable to that service. Under the relevance standard reflected in *Canadian Pac Ry Co , supra*, CSXT should be compelled to produce the requested data.

⁹ In addition, it is well-settled that the Board's discovery rules are to be liberally construed. *See, e.g., Bar Ale, Inc. California Northern R R*, Finance Docket No 32821 (STB served March 15, 1996) at 2.

**D. CSXT Has Not Provided the Specificity
Needed to Sustain its Overbreadth Objection**

Finally, CSXT objects to RFP No 107 and 111-113 on grounds that they are "overbroad." Responses at 9, 12-13. However, the only specifics offered in support of the objection is a reference to SECI's request that the documents produced in response to RFP Nos 111-113 be sufficient to describe the identified subject matter "in detail." *Id*. The objection should be overruled.

A party responding to a discovery request is required to give substantive responses. "boilerplate, generalized responses are not sufficient to satisfy a party's discovery obligations." *Trailer Bridge, Inc v Sea Star Lines, LLC*, STB Docket No WCC-104 (STB served Oct 27, 2000) at 8. "An objection to a discovery request cannot be merely conclusory, and that intoning the 'overly broad and burdensome' litany, without more, does not express a valid objection." *Mead Corp v Riverwood Natural Resources Corp*, 145 F.R.D. 512, 515 (D Minn 1992). In its overbreadth objection, CSXT offers little more than just such a generalization, and no explanation as to how SECI's request for detail broadens the scope of CSXT's search obligations. Indeed, by targeting its request to documents *sufficient to show* the subject matter, SECI is allowing CSXT to limit production to the responsive documents that provide the most detail, redundant documents that are more general in nature and contain no additional responsive information need not be provided.

CONCLUSION

For the foregoing reasons, the Board should overrule CSXT's objections and compel substantive responses to SECI's Fourth Requests for Production of Documents

Respectfully submitted

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Dated January 23, 2009

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Exhibit B

CSXT Reply to SECI Motion to Compel

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SEMINOLE ELECTRIC COOPERATIVE, INC.)	
)	
Complainant,)	
v.)	Docket No. NOR 42110
)	
CSX TRANSPORTATION, INC.)	
Defendant)	
)	

**DEFENDANT CSX TRANSPORTATION, INC.'S
OPPOSITION TO MOTION TO COMPEL**

Defendant CSX Transportation, Inc. ("CSXT") hereby submits its opposition to Seminole Electric Cooperative, Inc.'s ("SECI") First Motion to Compel Discovery ("Motion") pursuant to the Board's regulations at 49 C.F.R. § 1114.31.

INTRODUCTION

Complainant SECI seeks to compel CSXT to produce documents and information maintained by non-party CSX Intermodal ("Intermodal"), claiming that it is entitled to use this information to develop its Stand-Alone Railroad ("SARR"). *See* Complainant's First Motion to Compel Discovery at 3-4, *Seminole Elect. Coop. Inc. v CSX Transportation, Inc* , STB Dkt No. 42110 (Jan. 23, 2009) ("Motion"). As CSXT demonstrates below, the information SECI seeks is not relevant to this rate case. CSXT has agreed to produce documents providing relevant information concerning the rail transportation services that CSXT provides to Intermodal. The documents and information that CSXT will produce to SECI will allow SECI to determine CSXT's costs and revenues associated with intermodal traffic – which is precisely what SECI is entitled to, for purposes of designing a SARR that will stand in the shoes of CSXT.

As discussed in more detail below, CSXT has agreed to produce significant information responsive to SECI's Fourth Requests for Production of Documents, including information that appears to be covered by the literal terms of the Motion. CSXT emphasizes that it is not refusing to produce information in CSXT's possession on the ground that it relates to Intermodal or CSXT's relationship with Intermodal.¹

I. CSXT IS PRODUCING ALL THE INFORMATION NECESSARY TO DETERMINE ITS COSTS AND REVENUES ASSOCIATED WITH MOVING INTERMODAL'S TRAFFIC.

Contrary to SECI's suggestion, CSXT has produced, and will continue to produce, relevant documents and information in CSXT's possession that concern or pertain to third parties and CSXT's agreements and transactions with third parties, including Intermodal. *See, e.g.,* CSXT Response to SECI RFP 107; *cf.* Motion at 6 (noting that SECI has produced documents "related to non-parties unaffiliated with SECI"). SECI does *not* claim that it has produced documents that are maintained or possessed exclusively by third parties. Likewise, CSXT is

¹ SECI's reliance on cases where parties have produced "information related to non-parties and non-carriers" is a red herring. Motion at 6. CSXT has not refused to produce "information related to non-parties"—it is producing all information in CSXT's possession related to the transportation service CSXT provides to Intermodal and related to the transfer price payments through which CSXT is compensated for that service. SECI has not filed this motion to obtain CSXT information "related to" Intermodal — it has filed this motion to obtain information in the possession of Intermodal that is maintained by Intermodal. And, as SECI admits, it seeks this non-CSXT information in order to determine whether to incorporate non-CSXT revenues into its SARR. SECI has cited no authority holding that it can discover this irrelevant Intermodal information (because there is none). Indeed, only two of the decisions cited by SECI (Motion at 6) even involved motions to compel. *See Texas Municipal Power Agency v. Burlington No. & Santa Fe Ry. Co.*, STB Docket No. 42056 (Mar. 13, 2001); *FMC Wyoming Corp. v. Union Pacific R.R. Co.*, STB Docket No. 42022 (Feb. 4, 1998). One decision involved a discovery request for a joint facility agreement and is therefore entirely inapposite — in this case CSXT agreed to produce joint facilities agreements. *See Texas Municipal Power Agency* at 2. The other was an equally inapplicable decision related to discovery of expert witnesses. *See FMC Wyoming* at 4-6.

producing documents in its possession that are related to third parties. but it is not producing documents that are in the exclusive possession of third parties.

Accordingly, Defendant CSXT will produce information sufficient to allow SECI to determine CSXT's costs and revenues associated with intermodal traffic. CSXT will produce relevant agreements between CSXT and Intermodal regarding the calculation and payment of the fee for rail transportation service, and other fees. And, CSXT will produce documents showing the amount of those fees, and how they are calculated on a monthly basis. Using this information, SECI will be able to determine the revenue received by CSXT for moving Intermodal's rail traffic. Thus, CSXT is producing the relevant information that SECI needs in order to determine whether to include Intermodal's traffic in its SARR. *See* SECI Request for Production ("RFP") No. 107.

CSXT is not withholding any information responsive to RFP No. 105. The traffic files that CSXT has already produced identify certain shipment and event information for the trailers and containers that CSXT moves for Intermodal. In addition, these traffic files also include some data on flatcars used to move intermodal traffic. Additional responsive information, to the extent it exists, would be maintained in Intermodal's own databases, which are separately maintained.

RFP 106 again asks for links to data that, if it exists, would be in the exclusive possession of Intermodal. In addition, even if Intermodal collects and records the data sought in RFP 105, there is no "link" between CSXT "waybill/car movement/train movement records" and Intermodal data sought by RFP 105. To create, develop, and implement such links would be an enormously time- and resource-consuming task, and the Board has long held that parties to rate cases are not required to undertake such special studies.

In response to RFP 108, CSXT intends to produce reasonably available information concerning assets owned or leased by CSXT (including any assets that CSXT may have leased to Intermodal). CSXT will also produce relevant and responsive documents in CSXT's possession that pertain to Intermodal. CSXT does not intend to ask Intermodal to search for and produce information pertaining to assets owned or leased by Intermodal (except for assets owned by CSXT and leased by Intermodal), because Intermodal is not a party to this case, and it is not a rail carrier. In response to RFP 109, CSXT has already advised SECI that CSXT will produce a copy of the operating agreement that SECI has requested. There is thus no dispute about RFP 109.

RFPs 110-113 seek information exclusively pertaining to Intermodal's assets, equipment, facilities, employees, and purchases from other third parties. Here again, CSXT does not record or maintain such information or data, and Intermodal is not a party to this case.

II. INTERMODAL AND CSXT ARE TWO SEPARATE CORPORATIONS, AND INTERMODAL IS NOT A PARTY TO THIS CASE.

As CSXT has explained to SECI, Intermodal and CSXT are separate corporations. CSXT is incorporated in the State of Virginia, provides rail transportation services, and is a rail carrier regulated by the Board. Intermodal is incorporated in the State of Delaware, and is neither a rail carrier nor regulated by the Board. Intermodal has more than 1000 employees, a separate payroll from CSXT, and is headquartered in a separate office building. It provides intermodal transportation services using its fleets of trucks and containers and a network of intermodal terminals. Intermodal does significant business with major Class I rail carriers, including CSXT. Intermodal and CSXT are legally and financially separate, and the financial results of Intermodal are reported separately from the financial results of CSXT.

As part of the services it provides to its customers, Intermodal purchases rail transportation services for its trailers and containers. CSXT provides rail transportation services to Intermodal in accordance with a Transportation Services Agreement. The Agreement obligates CSXT to move Intermodal's traffic over CSXT's rail system in exchange for a "Rail Transportation Fee," which is based on, and intended to approximate, the full attributable costs of those movements. CSXT bills Intermodal the Rail Transportation Fee prescribed by the Agreement on a monthly basis, and Intermodal pays those amounts. The Rail Transportation Fee that Intermodal pays to CSXT under the Agreement constitutes CSXT's revenue for rail transportation services it provides to Intermodal.² The net revenue to Intermodal is the difference between the revenue it collects from its customers, and the cost of providing the service, including the Rail Transportation Fee.

The revenue that CSXT reports to the Board in its Form R-1 for moving Intermodal's traffic is the amount that Intermodal pays to CSXT for that service. The Board is aware of how CSXT calculates and reports those intermodal revenues.³ There is no reason that non-party Intermodal should be required to search for and produce cost and revenue information in order to allow Complainant to determine whether to hypothesize that its SARR would collect non-CSXT

² In addition to the Rail Transportation Fee, Intermodal also pays other miscellaneous fees to CSXT to cover the costs of services CSXT provides to Intermodal, including lease payments for rental property and administrative services payments. CSXT will produce governing agreements and billing information that show the amounts of these fees and other revenue CSXT obtains from Intermodal in exchange for the services it provides to Intermodal.

³ SECI misunderstands the nature of the reporting adjustment CSXT made in 2002. See Motion at 6. Prior to 2002, CSXT had been recording the Intermodal transfer fee payment as a "reimbursement of CSX Transportation's operating expenses" (*i.e.*, a reduction of operating expenses), in accordance with GAAP. Because the Board's Uniform System of Accounts treats such payments differently, the Board asked CSXT to adjust the way it reported those payments on its Form R-1. CSXT agreed to make this adjustment, and Intermodal's payments to CSXT are now recorded as CSXT revenue, rather than an expense offset. See STB Asst. Chief Paul Aguiar Letter to CSXT Asst. Controller Darrell Mitchell (July 29, 2002).

revenues. As demonstrated below, the Board's cases make clear that the SARR steps into the shoes of the incumbent, and complainants may not assume the SARR would be able to take advantage of revenues earned by non-parties.

III. ARGUMENT

As demonstrated below, SECI has failed to carry its burden in this motion for several reasons. *First*, the documents and information whose production SECI seeks to compel is simply not relevant to matters at issue in this case. *Second*, the Motion seeks discovery from a non-party under discovery rules that are limited to parties. *Third*, even if the information SECI seeks were relevant and in the possession of CSXT, the only way it could be developed and provided would be through a burdensome special study. This is not the proper forum for changing the Board's sound, longstanding rules concerning special studies, and SECI's vague and indefinite arguments are insufficient to warrant serious consideration in any event.

Movant's Burden of Proof in a Motion to Compel Discovery

SECI bears the burden of proving that the Board should compel CSXT to produce the requested documents. *Allen v. Howmedica Leibinger, GmbH*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999). In considering motions to compel discovery, the Board has said that it "will balance the burden and potential disruption that [the proponent's] proposal would impose on [the other party] with [the proponent's] need for the information and the possibility of obtaining it through other means." *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42056, 2001 WL 112303, at *3 (Feb. 9, 2001); *see also Can. Pac. Ry. Co. ---Control---Dakota, Minn. & E. R.R. Corp.*, STB Fin. Docket 35081, 2008 WL 820744, at *6 (March 27, 2008) ("The scope of the request would clearly constitute a burden We must balance that burden against the facts that the information is not relevant to the particular foreclosure theories advanced.").

Moreover, “[o]nce an objection to the relevance of the information sought is raised, the burden shifts to the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action.” *Allen v. Howmedica Leibinger, GmbH*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999). A party seeking to compel discovery must “show clearly that the information sought is relevant and would lead to admissible evidence.” *Export Worldwide, Ltd. v Knight*, 241 F.R.D. 259, 263 (W.D. Tex. 2006); *Alexander v. FBI*, 186 F.R.D. 154, 159 (D.D.C. 1999) (“[T]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant.”). In considering a motion to compel, the Board has recognized that information is relevant for discovery purposes only when the specific information sought is necessary for the Board’s determination in the litigation. *Canadian Nat’l Ry. Co. & Grand Trunk Corp. Control—EJ&E West Co.*, STB Fin. Docket. No. 35087 (Feb. 22, 2008); *Salt Lake City Corp. —Adverse Abandonment—In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No 183), 2002 WL 27988, at *1 (Jan. 11, 2002).

A. Information Regarding Intermodal’s Revenues and Costs Is Irrelevant.

Intermodal receives the full revenue paid by its customers for intermodal services, including the rail service that Intermodal purchases from CSXT. As SECI asserts, Intermodal pays CSXT a contractual fee for the rail transportation services CSXT provides to Intermodal (as well as other miscellaneous fees, as noted above). Contrary to SECI’s assertions, however, Intermodal’s revenues and costs are irrelevant to the determination of stand-alone costs in this case.

SECI contends that (1) it appears that the Rail Transportation Fee paid to CSXT covers only CSXT’s actual operating costs; (2) the remaining revenue earned by Intermodal “would include the full profit or margin on the overall intermodal move (including the rail portion)”; and (3) therefore data regarding CSX Corporation’s assessment of the profitability of the intermodal

traffic “is relevant to the question of the degree to which the revenues that would be available to a SARR if it replicated the CSXT/CSXI service would exceed the total costs attributable to that service.” Motion at 11. Without that data, SECI claims, it will be unable to assess “the full measure of revenue associated with the inclusion of CSXT’s intermodal traffic in its SARR configuration.” *Id.* at 8.⁴

SECI’s arguments are without merit. Although the Board’s rules generally provide for liberal discovery, discovery must be “directed toward a relevant issue,” and is not permitted “when it is clear that the information [the complainant is] seeking is not relevant.” *E.g., Duk e Energy Corp. v. Norfolk Southern Ry. Co.*, Docket Nos. 42069, *et al.*, Decision served July 26, 2002, 2002 WL 1730020 (S.T.B.), at *3; *Sierra Pacific Power Co. v. Union Pacific R R. Co.*, Docket No. 42012, Decision served April 15, 1998, 1998 WL 177704, at *2.⁵ Here, it is clear that Intermodal’s revenues and costs are not relevant.

⁴ SECI’s motion should be denied for the independent reason that it seeks prohibited discovery of CSX’s internal profitability assessments. It is well-established that the Board does not allow discovery of a carrier’s sensitive internal management costing systems, or data or information concerning a carrier’s internal profitability assessments. *See, e.g., Entergy Arkansas and Entergy Services, Inc. v. Union Pacific Railroad Company*, STB Dkt. No. 42104, Decision at 4, n. 5 (May 7, 2008) (collecting cases). Here, SECI seeks non-party “CSX Corporation’s internal assessment of the profitability” of intermodal traffic, a category of information Board has held is not relevant to a SAC analysis, and therefore is not subject to discovery in a SAC case. *See id.*; *see also Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), Decision at 57 (Oct. 30, 2006); *Kansas City Power & Light Company v. Union Pacific Railroad Co.*, STB Dkt. No. 42095, Decision at 2 (Feb. 15, 2006).

⁵ SECI asserts that “relevance is established if the information in question might affect the outcome of a proceeding,” citing *Waterloo Railway Company – Adverse Abandonment – Lines of Bagor and Aroostook Railroad Company and Van Buren Bridge Company In Aroostook County, Maine*, Docket Nos. AB-124 (Sub-No. 2) *et al.*, Decision served Nov. 14, 2003 (“*Waterloo Railway*”). *See* Motion at 11. SECI’s reliance on *Waterloo Railway*, however, is misplaced, because the Board *also* stated in *Waterloo Railway* that “discovery ... may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” *Waterloo Railway*, slip op. at 2 (footnote omitted). In fact, in *Waterloo* the Board denied a motion to compel responses to certain document requests because “the vast majority of information” that was sought in the requests “does not appear to be relevant to the issues in these proceedings.”

As an intermodal service company, Intermodal is not a rail carrier and not subject to the Board's jurisdiction. SECI cites no authority to support its position that information regarding the revenues and costs of a non-regulated intermodal company can properly be considered in calculating the stand-alone costs of railroad transportation that *is* subject to the Board's jurisdiction.

The fundamental limitation that Seminole fails to acknowledge is that, in a SAC analysis, the SARR must step into the shoes of the incumbent rail carrier. That means that the SARR incurs the same costs, and earns the same revenues, as those incurred and earned by the incumbent in moving the SARR traffic. CSXT earns a cost-based fee for the rail transportation service it provides to Intermodal. In this respect, Intermodal is just like any other third party for purposes of a SAC analysis – the SARR is entitled to the same revenues to which the defendant rail carrier is entitled under its arrangement with the third party, nothing more and nothing less. Where, for example, CSXT has a haulage rights agreement with another rail carrier, the SARR would be entitled to the haulage rights fee and revenue that CSXT would collect from that carrier, but not any additional profit or net revenue the other carrier earns from its customers on that traffic, or even on the segment for which CSXT provides haulage.

The Board has consistently held that a stand-alone cost analysis may not include costs that the incumbent carrier does not actually incur,⁶ or revenues that the incumbent does not

and compelling responses to those requests “would force the parties to search extensively for much information that has little or no relevance to those proceedings.” *Id.* Thus, the requests were “simply too burdensome.” *Id.* Precisely the same situation exists here. In light of its irrelevance, information regarding Intermodal's costs, revenues, and margins would not “affect the outcome” of this proceeding. Thus, even if Intermodal were a party, compelling it to produce the information SECI seeks it would be an unreasonable and unduly burdensome requirement.

⁶ See, e.g., *Burlington Northern R.R. Co. v. STB*, 114 F.3d 206, 214 (D.C. Cir. 1997) (affirming Board's definition of “barriers to entry” as costs that a new entrant would incur that were not incurred by the incumbent, and Board's decision to exclude certain costs from SARR's costs

actually receive. See *Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42058, Decision served August 20, 2002, 2002, at 6 (“*AEPCO I*”). In *AEPCO I*, for example, the Board held that the complainant could not include, in the traffic group of the “sub-SARR” used to test the challenged single-line rates of Union Pacific (“UP”), traffic that was not carried by UP, because such an approach would overstate the revenues that UP received from the movements at issue. As the Board explained:

It would be equally inappropriate for a complainant to include non-UP traffic in the traffic group of any part of a SARR aimed at testing UP’s single-line rates for the Colorado coal traffic. UP’s single-line rates should not be judged as if UP has the benefit of revenues from traffic in which it does not participate. Just as our SAC analyses do not include types of costs not incurred by the defendant carrier, they should not include revenues not received by the defendant carrier.

AEPCO invokes the economic theory of contestable markets, in which the SAC constraint is rooted, to argue that there should not be any traffic restrictions or limitations on efficient alternatives to existing systems in a SAC analysis. But our SAC constraint is meant to serve as a practical tool, not a mere exercise in market theory divorced from its purpose of judging the reasonableness of the defendant carrier’s pricing. When the purpose of the SAC exercise is taken into consideration, it becomes clear that a defendant carrier’s ability to recover reasonable costs and earn adequate revenues should not be limited by the inclusion in our

because there was no evidence that Burlington Northern had incurred them); *Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42058, Decision served Nov. 19, 2003, at 6 (“*AEPCO II*”) (“Incorporating into a SAC analysis cost-sharing or cost-saving arrangements with third parties is fully consistent with the SAC principle that a SARR should not incur costs that the defendant carrier does not or need not incur”); *Wisconsin Power & Light Co. v. Union Pacific R.R. Co.*, Docket No. 42051, Decision served Sept. 13, 2001, at 85 (“it is well-settled that the cost of land is excluded from our SAC analysis as a barrier-to-entry cost where the defendant carrier did not incur that cost”); *McCarty Farms, Inc. v. Burlington Northern*, 2 S.T.B. 460, 504 (1997) (“we assign a zero cost to property acquired by the incumbent by easement where the incumbent railroad has not shown that any cost was incurred for procuring or maintaining the easement”); *Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 2 S.T.B. 367, 386 (1997) (“a SAC computation should exclude any sunk costs that were not incurred by the incumbent”).

rate reasonableness analysis of another carrier's traffic and revenues that do not or could not reasonably be expected to pay for the defendant carrier's costs. Guidelines, 1 I.C.C.2d at 534. In short, there are limits to the creativity with which a complainant such as AEPCO may develop its SARR.

Id. at 6-7 (emphasis added; footnotes omitted). In other words, for purposes of calculating the revenues to be received by the SARR, the SARR must “step into the shoes” of the incumbent carrier, and can earn no more than the revenues that the incumbent actually collects.

Similarly, in *AEPCO I* the Board ruled that a SARR may replicate existing cost-sharing arrangements with other carriers. “but may not hypothesize non-existent revenue or cost-sharing arrangements.” *Id.* at 7. For that reason, the Board held that in designing a SARR, the complainant could assume certain existing trackage rights agreements made by UP (including the trackage rights fees paid under those agreements) as long as “the terms of those arrangements (including operational provisions and terms of compensation) are *the same as those applicable to the defendant carriers.*”⁷

This principle – that the SARR may not hypothesize that it would earn more revenues than the incumbent railroad actually receives – has been applied to various other sources of an incumbent railroad's revenues. For example, to the extent that shippers with transportation contracts are included in the traffic base for the SARR, the revenues received by the SARR must

⁷*AEPCO I* at 7 (emphasis added); *see also Arizona Electric Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42053, Decision served March 15, 2005, 2005 WL 638319 (S.T.B.), at *4 (“*AEPCO III*”), *aff'd sub nom Arizona Electric Power Cooperative, Inc. v. STB*, 454 F.3d 359, 364-366 (D.C. Cir. 2006). The Board reiterated this principle in *AEP Texas North Co. v. BNSF Ry. Co.*, Docket No. 41191 (Sub-No. 1), Decision served Sept. 10, 2007, 2007 WL 2680223 (S.T.B.) (“*AEP Texas*”), where it approved the inclusion of a trackage rights agreement in the stand-alone analysis. There, UP transported coal to one of the complainant's plants, but part of UP's movement was over one of the lines of BNSF (the defendant). The Board held that “Because the [SARR] would replicate the BNSF line segments that UP uses for the ... traffic, it may also replicate the trackage rights arrangement that applies to those line segments. Accordingly, *AEP Texas properly presumed that the [SARR] would receive the same trackage right fees that BNSF receives for UP's use of those line segments.*” *Id.* at *28 (emphasis added).

match those received by the incumbent during the contract term. *See, e.g., West Texas Utilities Co. v. Burlington Northern R.R. Co.*, 1 S.T.B. 638, 657 (1996) (“*West Texas I*”), *petition for review denied sub nom. Burlington Northern R.R. Co. v. STB*, *supra* (“The SAC analysis assumes that [the SARR] would replace BN, that is, step into the shoes of BN under the existing transportation contracts”).⁸ Similarly, the revenue divisions for inter-line movements used by the SARR must be the same as those for the incumbent railroad on the same lines. *AEP Texas*, 2007 WL 2680223, at *30 (“The parties agree that the [SARR] would receive the same revenue division from inter-line movements as BNSF does”).

CSXT has agreed to produce its agreement with Intermodal that provides how the transfer fee is calculated, and the revenues CSXT receives for the rail transportation service it provides to Intermodal. CSXT is also willing to produce documents showing the amounts of the actual transfer payments it has received for relevant periods. That information is sufficient for Seminole to determine CSXT’s revenues from traffic it carries for Intermodal, which is all that is relevant to the SARR analysis.

⁸*See also, e.g., West Texas Utilities Co. v. Burlington Northern and Santa Fe Ry. Co.*, Docket No. 41191, Decision served Sept. 10, 2007, 2007 WL 2590261 (S.T.B.), at *5 & n.14 (citing quoted principle from *West Texas I* in reopening proceeding to allow complainant to add traffic to the SARR’s traffic group that had not been foreseen at time of original decision); *AEP Texas*, 2007 WL 2680223 at *30 (approving parties’ calculation of revenues, for future traffic moving under contract, by using escalation factor provided in the relevant contracts); *Otter Tail Power Co. v. BNSF Railway Co.*, Finance Docket No. 42071, Decision served Jan. 27, 2006, 2006 WL 275904 (S.T.B.), at *18 (“for projecting future tonnage and revenues for the [SARR’s] traffic group, our analysis relies on existing contracts (where applicable), actual data for 2002, BNSF’s internal coal tonnage forecasts for 2003, and the coal tonnage and revenue projections for the PRB region obtained from the U.S. Department of Energy’s Energy Information Administration (EIA) for 2003-21”) (emphasis added). *Cf. Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520, 544 (1985), *aff’d sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987) (stating that, although revenue contribution of traffic may be adjusted if it is shown that rates are not at the Ramsey optimal level, “[i]n making such adjustments, ... we will recognize that contracts may result in a greater revenue contribution to the system than Ramsey optimal prices”).

In short, in determining the SARR's revenues, the only relevant evidence or consideration is the amount that CSXT, the incumbent railroad, actually collects for the rail transportation services that it provides. To consider the additional revenues collected and retained by Intermodal would attribute more revenue to CSXT than the rail carrier actually collects – a practice that the Board has clearly and unequivocally prohibited in a SAC analysis. Consequently, Intermodal's revenues, costs, and "margins" are irrelevant, and SECI's attempt to obtain such information should be rejected.

B. The Board Should Decline SECI's Invitation To Drastically Overhaul The Availability Of The Special Study Objection.

SECI's Motion asserts that its "Fourth Requests seek only data and documents as retained by CSXT in the regular course of business." Mot. at 9 (emphasis added). That is exactly what CSXT has told SECI it will produce. *See supra*. Given that the parties are apparently in agreement, SECI's objection to parties' right to refuse to conduct special studies is neither implicated nor presented here, and the Board need not consider it. Indeed, because this situation does not present a concrete context in which to consider or apply the prohibition against special studies, it would not be wise for the Board to accept SECI's invitation to consider new discovery limitations or precedents here. However, should the Board consider SECI's unnecessary and unwarranted request for a re-definition of what constitutes a special study, CSXT briefly addresses that unripe argument.

SECI's request that the Board "clarify" what is meant by a special study is an attempt to reopen the request by coal shippers, including SECI, to "revisit Board policy regarding 'special studies'" in the recent *Major Issues in Rail Rate Cases* rulemaking. *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 57 (Oct. 30, 2006). This is merely a further "attempt to relitigate issues that have been resolved in prior cases" and in a recent

comprehensive rulemaking. *See General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte 347 (Sub-No. 3) (served March 12, 2001). In that rulemaking, the Board reiterated that “requiring railroads to generate or assemble more data for the sake of litigation goes against the Congressional directive to minimize the need for Federal regulation.” *Major Issues*, at 57.

There is no need for further clarification of what constitutes a “special study”; the Board’s recent decisions are perfectly clear. “A party can not be required to prepare new documents solely for their production.” *Canadian Nat’l Ry. Co.—Control—EJ&E W Co.*, STB Fin. Docket No. 35087, 2008 WL 4180309 (served Sept. 11, 2008). A party must conduct a reasonable search for records within its possession, custody, or control, which, at minimum, “should include files that are located on its premises, files that are kept electronically, and the off-site storage or archived files of those individual employees or departments likely to have responsive information.” *Entergy Ark., Inc. v Un. Pac. R.R. Co.*, STB Docket No. 42104, slip op. at 5-6 (served May 19, 2008). A party “does not have to conduct special studies or attempt to recreate information that was not kept in the ordinary course of business.” *Id* at 6.

SECI claims that a special study should be distinguished from discovery requests that ask “for defined categories of information from a larger database, or an explanation or illustration of the manner in which a railroad’s different databases may be searched or linked.” Mot. at 10. A distinction must be made between using existing reports and simple searching of stand-alone databases and designing new searches across multiple databases to create custom reports. The latter essentially requires the creation of a new software application. SECI exhibits a lack of understanding of the difficulties in creating new computerized data reports when it suggests that it is a trivial matter to create custom reports across standalone database systems. Because of the

great expense in designing, creating, and maintaining business applications. companies only implement new and separate database systems when there is a failing in the old system(s), or some problem the old system(s) cannot solve. Different database systems necessarily contain different data and creating a link requires a testing and reconciliation process to ensure correct and complete data. CSXT would agree that a party is required to provide “a data search or report that does not exist ‘on the shelf,’ but readily could be provided if requested to railroad management.” *See* Mot. at 10. However, SECI cannot point to any case where CSXT has invoked the special study objection to refuse to provide a data search or report that could be readily provided to CSXT management.

* * * * *

In sum, SECI has failed to carry its burden of proving that the information it seeks is relevant. Because CSXT has agreed to provide information sufficient to allow SECI to include the rail portion of Intermodal traffic in its SARR, SECI is not prejudiced by the application of the Board’s established rules and limitations on discovery.

CONCLUSION

For all of the foregoing reasons, the Board should deny SECI's Motion to Compel.

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